In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 733

IRENE MOSES, Claimant of One 1949 Pontiac Sedan, Motor No. P-8 RH 10913, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 75-82), are reported at 194 F. 2d 756.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1952 (R. 83). The petition for a writ of certiorari was filed April 23, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was "probable cause" to institute libel proceedings against this particular automobile for having been used to transport narcotics unlawfully obtained.

STATUTES INVOLVED

The Supplemental Forfeiture Act of August 9, 1939, 53 Stat. 1291-1293, as amended by the Act of August 9, 1950, 64 Stat. 427, 49 U.S.C. 781-788, provides in pertinent part:

Section 1:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of any one in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
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> (b) As used in this section, the term "contraband article" means—
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> (1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, trans-

ferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary * * * ; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

* * *

Section 2:

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 1, or in, upon, or by means of which any violation of section 1 has taken or is taking place, shall be seized and forfeited * * * .

Section 4:

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels and vehicles for violation of the customs laws; the disposition of such vessels and vehicles or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof * * * .

Section 615 of the Tariff Act of 1930, 46 Stat. 757, as amended by Section 207 of the Anti-Smuggling Act, 49 Stat. 525-526, 19 U.S.C. 1615 provides:

> *Burden of Proof in Forfeiture Proceeding.* In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant * * *: *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:
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> (1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vechicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.
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> (2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.
>
> (3) The fact that a vessel of any description is found, or discovered to have been, in the

> vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

Section 2553(a) of the Internal Revenue Code, 26 U.S.C. 2553(a):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Section 2 of the Act of February 9, 1909, 35 Stat. 614, as amended, 21 U.S.C. 174, provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Under the Supplemental Forfeiture Act of 1939 (*supra,* pp. 2-3), any vehicle used to transport contraband, including illegally acquired narcotics, is subject to seizure and forfeiture. The burden of proving that there is no right to forfeiture is on the claimant of the seized article, provided only that the Government first show probable cause for the institution of the proceeding.[1]

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[1] This burden is imposed by Section 207 of the Anti-Smuggling Act (19 U.S.C. 1615), which is made applicable to seizure under the Supplemental Fofeiture Act by Section 4 of that Act (*supra,* p. 3).

On August 22, 1949, the United States filed a libel against One 1949 Pontiac Sedan, Motor No. P-8RH10913, charging, *inter alia,* that the car was used for the transportation of narcotics which were contraband in that they were "not purchased in the original stamped packages or from the original stamped packages as required by law * * * ." (R. 3-5.)[2]

On the trial, the evidence of the Government, consisting partly of the testimony of United States narcotic agent Sojat, and partly of stipulations between the Government and petitioner, was in substance as follows:

On May 5, 1949, three United States narcotics agents, Sojat, Pocoroba, and Gross, proceeded to 6223 Champlain Avenue, Chicago, Illinois, for the purpose of executing a search warrant (R. 10). Before entering the premises Sojat and Pocoroba scanned both sides of the street for a distance of about three-quarters of a block to determine whether a certain green 1949 Pontiac sedan, libellee herein, was parked there; but the car was not in sight (R. 12-13). It was known to agent Pocoroba that this car was being used by one Marvin Moses (R. 25-26), who lived at the premises to be searched.

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[2] The second count was the same except that the morphine sulphate was alleged to have been contraband because knowingly imported or brought into the United States contrary to law, 21 U.S.C. 174. The court below did not deal with the second count separately because it sufficed to sustain the seizure that the Government had made its case under the first count (R. 82).

During the search conducted pursuant to the warrant, the agents discovered a steamer trunk containing 1486 grains of heroin in capsules and bulk, seven-half ounces of heroin in a glass jar, and 2800 grains of cocaine in capsules and bulk (R. 11). About 30 minutes after their entry and before the search was completed, Marvin Moses entered the premises, identified himself, and admitted sole ownership of the steamer trunk and its contents (R. 11). He was immediately placed under arrest and searched. The agents found in one of the pockets of the sport coat which he had been wearing when he entered the premises, 40 tablets of morphine sulphate in a small, plain, white pasteboard box with no stamps of any kind on it (R. 11, 22). Sojat asked Moses if he were using narcotics "and he said no. And I asked him, 'What about these forty tablets?' He said that 'they are for somebody else.' I said, 'How much are these selling for?' He said, 'A dollar and a half apiece.' " (R. 22.) Sojat also asked Moses how he came to the building and Moses replied that "* * * he just drove up in his car and pointed out the front window towards the car parked in the vicinity. He had on his person the keys to this automobile * * *" (R. 22).

Following this conversation, the Government seized the car and subsequently filed this libel seeking its forfeiture (R. 3-5).

Petitioner, the wife of Marvin Moses, appeared as claimant, but offered no evidence (R. 26).

The District Court ruled that it would not consider Sojat's testimony that Marvin Moses admitted just arriving in the car, because it was hearsay and not admissible against the car under any exceptions to the hearsay rule. Consequently, it held that there was no competent testimony that Moses ever rode in the libellee automobile; or that, if he did so, he carried narcotics with him (R. 53). It also ruled that it could not presume from the mere fact that the tablets taken from Moses were in an unstamped container that they were either purchased in or from an unstamped container, or that they had been unlawfully imported, or that they had been transported in the subject vehicle (R. 56). The court concluded that there was no showing of probable cause for institution of proceedings against the automobile and entered judgment for its delivery to petitioner (R. 57).

On appeal from this judgment, the Court of Appeals held that probable cause for the institution of this suit depended on two things: probable cause to believe that the morphine sulphate seized was "contraband," and probable cause to believe that the libellee automobile was used to transport it. On the first, it held that in the circumstances of this case, it was proper to invoke the presumption of Section 2553(a) of the Internal Revenue Code that the possession of unstamped narcotics means that the narcotics were unlawfully purchased, and therefore contraband, even though

that section merely imposes individual criminal responsibility on persons found possessing narcotics (R. 78-80). On the second point, the court held that there was probable cause to believe that the libellee automobile had been used to transport the narcotics, even though it agreed with the District Court that the declarations of Marvin Moses that he "just drove up in his car", see p. 8, *supra,* were not properly usable against the libellee as "spontaneous declarations" or "res gestae" (R. 80-81). It held that the findings of fact of the District Court were clearly erroneous, reversed the judgment, and remanded the case with directions to enter a decree of forfeiture (R. 83). One judge dissented (R. 82).

ARGUMENT

The underlying assumption of all of petitioner's arguments is that proof of "probable cause" is equivalent to proof of guilt in a criminal trial. This assumption is erroneous.

The words "probable cause" have a long history of use in many contexts. The many cases dealing with their meaning show that "probable cause" is not equivalent to a prima facie case, although it plainly means more than a suspicion of guilt. See *Locke* v. *United States,* 7 Cranch 339, 347-348; *Wood* v. *United States,* 16 Pet. (U.S.) 342, 366; *Moore Ice Cream Co.* v. *Rose,* 289 U.S. 373, 381; *Carroll* v. *United States,* 267 U.S. 132, 161. In

Brinegar v. *United States*, 338 U.S. 160, 175, this Court recently said:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." * * *

The view that the standard of "probable cause" is reasonable ground for belief of guilt is consistent with the legislative history of the Supplemental Forfeiture Act of 1939, 49 U.S.C. 781-788, pursuant to which the present action was brought. Congress sought to strike at the narcotics traffic and make it less profitable by seizing the necessary tools of the trade, particularly the vehicles which made it easy to transport narcotics quickly without attracting suspicion. See H. Rep. 1054, 76th Cong., 1st sess., pp. 2-3. The necessity of such seizures to the effective administration of the narcotics laws, coupled with the difficulty of establishing as a matter of fact that an auto was in fact used to transport narcotics, indicates clearly than Congress intended no rigid standard of "probable cause."[3] Rather, it would appear

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[3] Moreover, subsections (1), (2) and (3) of Title 19, U.S. Code, Section 1615 (defining the burden of proof in forfeiture proceedings, see Statutes Involved, pp. 4-5, *supra*), set forth certain prima facie rules of proof which are also expressive of a congressional view that a heavy burden is properly placed on those whose vehicles or vessels are used in circumstances indicating a violation of the laws giving rise to forfeiture.

that Congress thought it was fair to require the owner of a vehicle, who ought to have ready access to the facts, and certainly has control over the vehicle, to come forward with an explanation, once it seems probable that the vehicle was used for an unlawful purpose. Indeed, there would be no real meaning to a provision shifting the burden of proving the complicity of the car if the standard of probable cause were as high as petitioner contends.

Thus, it suffices to sustain the forfeiture here that it seems likely, in all the circumstances, as the court below held, that Moses had obtained the narcotics unlawfully and that he had transported them in the car. Compare *United States* v. *One 1937 Hudson T. Coupe, Etc.*, 21 F. Supp. 600, 603 (W.D. Ky.). And since the District Court, in making its findings, applied an erroneous standard of "probable cause," the court below was warranted in reversing those findings as clearly erroneous.

1. The court below properly held that there was probable cause to believe that the narcotics found on Moses had been unlawfully obtained.

Petitioner argues that the court below was in error in permitting reliance in a forfeiture proceeding on the presumption of Section 2553(a) of the Internal Revenue Code, that the mere possession of unstamped narcotics is prima facie evidence that the drugs are unlawfully possessed.

She further argues that, without this presumption, there was no probable cause to believe that her husband had obtained the narcotics unlawfully. We submit that petitioner is wrong in both contentions.

a. In *Casey* v. *United States,* 276 U.S. 413, this Court held that the presumption created by a statute similar to Section 2553(a) was a rational one, i.e., reasonable in light of common experience. Cf. *Yee Hem* v. *United States,* 268 U.S. 178; *Copperthwaite* v. *United States,* 37 F. 2d 846 (C.A. 6). The fact that Congress legislated only with respect to criminal proceedings does not lessen the reasonableness of the inference from possession when it occurs in other situations.

If the unstamped condition of narcotics can be used as prima facie evidence of unlawful possession in a criminal case against an individual, then it must surely be a proper basis for the institution of this proceeding where the controlling statute requires only "probable cause" for belief in guilt.[4] The objection that there cannot be a presumption against an inanimate object is specious. Section 2553(a) is not used mechanically for its presumption, but as evidence of a reasonable and authoritative view of common experience. The character of the ultimate respondent has no relevance to the reasonableness of the inference

[4] Indeed, their unstamped character may itself make the narcotics contraband, 49 U.S.C. 781(b), *supra,* p. 3.

arising from the possession of unstamped narcotics that they were unlawfully possessed. See *United States* v. *One 6-54-B Oakland Touring Automobile,* 9 F. 2d 635, 636 (D. Ariz.).[5]

b. Moreover, without reference to Section 2553(a), it was shown here that experienced narcotics officers had just discovered Moses in possession of substantial amounts of narcotics, of widely varying kinds which Moses admitted he owned. In the circumstances, it is absurd to suppose that they were possessed legally. This fact alone separates Moses from the small class of people who might be expected to have acquired 40 tablets of morphine sulphate lawfully, and justifies the assumption that the tablets were unlawfully obtained.

In addition, Moses told the officers that the tablets were not for himself, but for "somebody else" and that they were selling for a "dollar and

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[5] Of the cases which are apparently contrary to the position of the court below it will be noted that one, *United States* v. *One Nash Coupe,* 47 F. 2d 249 (N.D. Ill.) is a decision of a District Court sitting in the circuit of the court below, and therefore must be regarded as no longer law even in the court which rendered it; and that another, *United States* v. *One Studebaker Roadster,* 40 F. 2d 557 (D. Tenn.) is the decision of a District Court in a circuit which has indicated that it would adopt the broader view taken in the court below. See *General Motors Acceptance Corp.* v. *United States,* 63 F. 2d 209, 210 (C.A. 6).

a half apiece" (R. 22).[6] This would seem clearly to justify the conclusion that Moses was in commercial narcotic operations, and the further conclusion that any narcotics he had were unlawfully obtained.

2. There was also probable cause to believe that Moses had used the libellee automobile to transport the seized narcotics.

a. The court below so found even though it ruled that the statement by Moses to the agent that he had just driven up in his car was properly excluded by the trial judge as hearsay. This conclusion is fully supported by the evidence the court deemed properly before it.

The agents, at least one of whom was familiar with Moses' car, had examined the vicinity approximately 30 minutes before Moses' arrival and had not seen the car. Immediately after Moses' arrival the car could be seen from the window of the premises. While it is conceivable that Moses could have obtained narcotics after he got out of the car, the probabilities, in view of the short time involved, are clearly the other way. The cache already discovered indicated that Moses was operating in the narcotics business on a fairly large scale and was himself avoiding addiction. It would seem particularly unlikely

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[6] The admissibility of this testimony depends on the same considerations as are discussed below, pp. 16-17.

that such a person would do business casually on the open street. And yet, so small a gap of time occurred that this would be almost a necessary alternative if Moses did not carry the drugs in the libellee auto. At the very least, the nature of this alternative indicates the strong likelihood that the car was used, as charged, and thereby clearly shows "probable cause."

b. The statement by Moses after narcotics were found on his person that he "just drove up in his car," if admissible would, of course, be further convincing evidence tending to establish "probable cause" to believe that Moses had carried narcotics in the car. We submit that the court below unduly limited itself in failing to consider this statement on the ground that it was hearsay as to the car.

Hearsay evidence is admissible to show the existence of probable cause, for the simple reason that that is often the kind of information that reasonable men act on. Special protections necessary to protect the fact finder in a trial are not relevant. The truthfulness of Moses' statement is not the issue. The only issue is whether it was reasonable for the narcotics agents to believe that Moses was telling the truth. If it was, the statements certainly added to the warrant for instituting the proceeding. Cf. *Commercial Credit Corporation* v. *United States,* 58 F. 2d 195 (C.A. 2).

In the *Brinegar* case, *supra,* this Court said, at p. 175:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

See also, *United States* v. *Bianco,* 189 F. 2d 716, 720, 721 (C.A. 3); *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C.A. 2).

The decision of the court below is thus based on a view of the evidence more favorable to petitioner than the applicable rules of law require.[7]

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[7] The conviction could also be sustained under the other charge of the Government's libel on essentially the same basis. There is some basis to believe that any morphine sulphate present in this country is imported. See *General Motors Acceptance Corporation* v. *United States,* 63 F. 2d 209, 210 (C.A. 6). Moreover, section 174 of Title 21 places the burden on a defendant in a criminal prosecution of showing that narcotics were not imported. So far as the case involves probable cause for assuming the car was thus used, the two counts raise the same problem.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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